Supreme Court, U. S.
FILED
NOV 25 1974
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

* * *

NO. 74-324

* * *

THE CITY OF DALLAS, TEXAS, THE CITY OF FORT WORTH, TEXAS, AND THE DALLAS-FORT WORTH REGIONAL AIRPORT BOARD
Petitioners

V.

SOUTHWEST AIRLINES CO. and TEXAS AERONAUTICS COMMISSION,
Respondents

* * *

BRIEF OF RESPONDENT, TEXAS AERONAUTICS COMMISSION, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

* * *

JOHN L. HILL
Attorney General of Texas

LARRY F. YORK
First Assistant

REX H. WHITE
Assistant Attorney General

Attorneys for Respondents
P. O. Box 12548
Austin, Texas 78711

TABLE OF CONTENTS

Page

Index of Authorities ii

Question Presented 1

Constitutional and Statutory Provisions Involved 2

Statement of the Case 3

The Writ Should be Denied for the Following Reasons 11

Conclusion 20

Certificate of Service 21

INDEX OF AUTHORITIES

Cases Cited	Page
Alpha Petroleum Co. v. Terrell, 122 Tex. 257, 59 S.W.2d 364, 367 (1933).	19
Braniff Airways, Inc. v. CAB, 473 F.2d 1150 (D.C. Cir. 1972).	6, 7, 13
City of Arlington v. Lillard, 116 Tex. 446, 294 S.W. 829 (1927)	12
City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624	17, 18
City of Dallas v. CAB, 221 F.2d 501 (D.C. Cir. 1954), cert.denied 348 U.S. 914 (1955)	13
City of Fort Worth v. Lillard, 116 Tex. 509, 294 S.W. 831 (1927).	12
City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320 (1958)	18
Florida Avocado Growers v. Paul, 373 U.S. 132, 142 (1963)	14
Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 446 (1960)	17
Rice v. Santa Fe Elevator Corporation, 331 U.S. 218, 230 (1947)	17
Siler v. Louisville and Nashville Railway Co., 213 U.S. 175 (1909).	12
State of Washington Dept. of Game v. F.P.C., 207 F.2d 391 (9th Cir. 1953), cert. denied 347 U.S. 936 (1954)	19

Texas Aeronautics Commission, et al v. Braniff Airways, Inc., 454 S.W.2d 199 (Tex.Sup. 1970), cert. denied 400 U.S. 943 (1970). 5, 7

United States v. City of New Haven, 496 F.2d 452 (2nd Cir. 1974), cert. denied 43 U.S. Law Week 3247 (1974). 18

Federal Statutes Cited

Noise Control Act of 1972, 42 U.S.C. Art. 4901, et seq. 17

Federal Aviation Act of 1958, 49 U.S.C. Sec. 1301, et seq. 49 U.S.C. Sec. 1371, et seq. 6, 7, 13, 18

Airport and Airway Development Act of 1970, 49 U.S.C. Sec. 1701, et seq. 3, 11, 13, 15, 18
49 U.S.C. Sec. 1714(a) 14
49 U.S.C. Sec. 1714(a)(1) and (2). 14
49 U.S.C. Sec. 1716(b) 15
49 U.S.C. Sec. 1716(c)(1)(D) and(E) . . . 15

Texas Constitution Cited

Article XI, Section 5 . . . . . 2, 12

Texas Statutes Cited

Texas Aeronautics Act, Article 46c-1, et seq., Vernon's Tex.Civ.Stat. 2, 4
Article 46c-1(3)(a), Vernon's Tex. Civ.Stat. 4
Article 46c-6(3)(e), Vernon's Tex. Civ.Stat. 19

Texas Municipal Airports Act, Article 46d-1, et seq., Vernon's Tex.Civ.Stat. 3, 9
Article 46d-7(b), Vernon's Tex. Civ.Stat. 12

Miscellaneous Cited

1968 Concurrent Bond Ordinance 9
Section 9.5 . . . . . 9, 11, 12, 16
Texas Aeronautics Commission Minute Order No. 22 . . . . . 4, 13, 19
U.S. Code Congressional and Administrative News, 1970, p. 3047. 14

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-324

THE CITY OF DALLAS, TEXAS,
THE CITY OF FORT WORTH, TEXAS,
AND THE DALLAS-FORT WORTH
REGIONAL AIRPORT BOARD,
Petitioners,

V.

SOUTHWEST AIRLINES CO. and
TEXAS AERONAUTICS COMMISSION,
Respondents.

BRIEF OF RESPONDENT, TEXAS AERONAUTICS COMMISSION, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED

This case involves the application of settled Texas law to ascertain the authority of a municipality to exclude state-certificated and authorized air carriers of intrastate passengers from a municipally-owned public airport. There are no special and important reasons necessitating review by this Court on Petition for Writ of Certiorari.

Rather than the sweeping questions of preemption and national policy presented by Petitioners, the determinative question is whether a Home Rule City in Texas, acting individually and through a Regional Airport Board created jointly with an adjacent Home Rule City, may exclude from its municipally-owned public airport an air carrier certificated by the State to conduct and required to maintain its intrastate air carrier passenger services at that municipally-owned public airport. The United States District Court for the Northern District of Texas, followed by the United States Court of Appeals for the Fifth Circuit, has correctly resolved the question against the Petitioners.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article XI, Section 5, Texas Constitution:

> "Sec. 5. Cities having more than five thousand (5000) inhabitants may, by a majority vote of the qualified voters of said city, at an election held for that purpose, adopt or amend their charters, subject to such limitations as may be prescribed by the Legislature and providing that no charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State; . . ."

2. Texas Aeronautics Act, Article 46c-1, et seq., Vernon's Tex.Civ.Stat. (Appendix E to Peti-

tion, pp. 1e-16e).

3. Texas Municipal Airports Act, Article 46d-1, et seq., Vernon's Tex.Civ.Stat. (Appendix D to Petition, pp. 1d-15d).

4. Airport and Airway Development Act of 1970, 49 U.S.C. Sec. 1701, et. seq. (Appendix H to Petition, pp. 1h-11h).

STATEMENT OF THE CASE

Petitioners' statement of the case is inaccurate and incomplete necessitating a restatement here by the Respondent to focus on those facts material to a consideration of the question presented. The factual context set forth by the United States Court of Appeals for the Fifth Circuit in its opinion (Appendix A to the Petition, pp. 1a-2a) substantially states the necessary elements forming the basis of that Court's decision. Presentation of supplementary facts material to the question presented will highlight the correctness of the Fifth Circuit decision.

The participants in this controversy, some of which have not been officially before the Courts below, are (1) the Texas Aeronautics Commission, (2) Southwest Airlines Co., (3) the Civil Aeronautics Board, (4) eight Civil Aeronautics Board-certificated air carriers, (5) the Cities of Dallas and Fort Worth, Texas, including their jointly created Dallas-Fort Worth Regional Airport Board, (6) the Federal Aviation Administration, and (7) the focal point of the controversy, Love Field, situated within

the limits of Dallas, Texas. Each of these participants is productive of certain factual elements, hereinafter set out, essential to establish the correct background upon which this case has been decided. There are of necessity some duplicative factual elements common to more than one of the enumerated participants.

(1) The Texas Aeronautics Commission (hereinafter "TAC"), pursuant to the authority granted to that agency in Article 46c-1, et seq., Vernon's Tex.Civ.Stat., issued a certificate of public convenience and necessity to Southwest Airlines Co. (hereinafter "Southwest") authorizing that air carrier to conduct its proposed air carrier passenger services between the terminal points of Dallas-Fort Worth and Houston, Dallas-Fort Worth and San Antonio, and Houston and San Antonio, and to the extent relevant here, authorized that air carrier to serve "any airport" in the Dallas-Fort Worth area. (R. 4366). Subsequent to that authorization, the TAC promulgated, pursuant to its authority in Article 46c-1, Subdivision 3(a), Vernon's Tex.Civ.Stat., a regulatory measure entitled "Minute Order No. 22". (R. 4368, 4369). That regulation of general application to all air carriers within the scope of the agency's jurisdiction instructed the air carriers that a carrier could not discontinue all air service to any airport through which such carrier presently provided air service without prior approval from the agency. To date the TAC has neither granted nor been asked to grant such approval for Southwest to terminate its certificated services at Dallas-Love Field.

(2) Southwest is the owner of a certificate of public convenience and necessity issued by the TAC providing that they may conduct their intrastate air carrier passenger services between the terminal points of Dallas-Fort Worth and Houston, Dallas-Fort Worth and San Antonio, and Houston and San Antonio, and to the extent relevant, provide such services through "any airport" in the Dallas-Fort Worth area. Southwest began flying immediately subsequent to the final determination in Texas Aeronautics Commission, et al v. Braniff Airway, Inc., 454 S.W.2d 199 (Tex.Sup. 1970), cert. denied 400 U.S. 943 (1970). Their services commenced between Love Field and two of the three terminal points authorized by their certificate authority. (R. 1279). Southwest has refused to sign a letter agreement with the Dallas-Forth Worth Regional Airport Board, the tenor of which letter agreement appears to require the signatory air carrier (Southwest) to move all of its air carrier services from Dallas-Love Field to the Dallas-Fort Worth Regional Airport upon the opening of the latter and requires the assumption of a certain financial obligation with respect to the revenue bonds outstanding against the Dallas-Fort Worth Regional Airport. (For example, see R. 3703-3706).

(3) The Civil Aeronautics Board (hereinafter "CAB") initiated an investigation in 1962 known as the Dallas-Fort Worth Regional Airport Investigation. (R. 1970-1974). The stated purpose of the investigation was to determine the necessity for amendment of the certificates of public convenience and necessity of the existing air carriers certificated by the CAB to serve both Dallas and Fort Worth

so as to require that all services conducted pursuant to those certificates be through a single airport. The CAB stated in a preliminary order issued subsequent to the hearing that it was of the opinion that all air carrier services should be conducted through a single airport. (R. 1979). This investigation was terminated in September, 1973, without the certificates of public convenience and necessity issued to the eight air carriers certificated by the CAB to serve the Dallas-Fort Worth area being amended.

The CAB has taken the position, at the instance of a complaint filed before the CAB by Braniff Airways, Inc. and Texas International Airlines, Inc., that it does not have, under the Federal Aviation Act of 1958, any measure of economic regulatory jurisdiction over the completely intrastate operations of Southwest. The position of the CAB was forcefully sustained by the D. C. Circuit in Braniff Airways, Inc. v. CAB, 473 F.2d 1150 (D.C. Cir. 1972). It is also noteworthy that the CAB has not intervened in this matter nor filed a statement of position as an amicus.

On its face, the order of the CAB dictating single airport service to the Dallas-Fort Worth area forcefully demonstrates that the preliminary decision of the CAB was based on considerations of public convenience and necessity rather than upon considerations dictated by the FAA, such as air space management, airport safety or airport control. (R. 1979).

(4) CAB Carriers. There are eight (8) carriers certificated by the CAB pursuant to the

FAA Act of 1958, 49 U.S.C. Sec. 1371, et. seq., to serve the Dallas-Fort Worth area. They are: Braniff Airways, United Air Lines, Delta Air Lines, American Airlines, Ozark Airlines, Frontier Airlines, Continental Air Lines, and Texas International Airlines. None are visible parties or intervenors in this matter. Three, namely, Braniff, Texas International and Continental, very forcefully contested before the Texas courts the grant of certificate authority by the TAC to Southwest to begin the operation in controversy here. Two, Braniff and Texas International, pursued the matter to this Court in Texas Aeronautics Commission, et al v. Braniff Airways, Inc., supra. The latter two carriers petitioned the CAB to have that agency exercise its jurisdiction over the operation of Southwest. That petition, as previously noted, was refused by the CAB, such action being subsequently sustained in Braniff Airways, Inc. v. CAB, supra.

These eight CAB-certificated carriers signed letter agreements with the Dallas-Fort Worth Regional Airport Board and the Cities (R. 3691, 3703, 3715, 3727, 3739, 3751, 3763, 3775), the tenor of which appears to be that each agreed to move all of its air carrier services to Dallas-Fort Worth Regional Airport upon its opening and to provide fees necessary to meet the debt service requirement on a certain portion of the revenue bonds. One of these CAB-certificated carriers, Braniff, retained limited air carrier services at Love Field after the opening of the Dallas-Fort Worth Regional Airport but has subsequently moved those remaining services to the D-FW Regional Airport. On the contrary, another CAB-certificated

carrier, Texas International, moved all of its air carrier services from Love Field to D-FW Regional Airport upon the opening of the latter, but subsequently returned a portion of its services to Love Field. (Opinion of the Fifth Circuit, Appendix A to Petition, p. 2a). The latter-mentioned activities are the subject of a lawsuit filed in the United States District Court for the Northern District of Texas by two of the CAB-certificated carriers, namely, Delta and American, against Braniff Airways and the Cities of Dallas and Fort Worth, Cause No. CA-4-74-84. That suit seeks to construe, among other things, the meaning and intent of the letter agreements.

Lastly, petitions for reconsideration have been filed with the CAB as a response to the final order of the CAB terminating the D-FW Regional Airport Investigation. The following CAB air carriers are supporting the action by the CAB terminating the investigation without amending the certificates of the carriers involved: Braniff, Texas International. Delta, American, Continental and the Petitioners have filed petitions for reconsideration complaining of the termination of the Dallas-Fort Worth Regional Airport Investigation without amending the certificates of the respective CAB-certificated air carriers. The petitions have not been acted upon by the CAB.

(5) The Cities of Dallas and Fort Worth, Texas, and their jointly-created Dallas-Fort Worth Regional Airport Board.

The City of Dallas (hereinafter "Dallas") is

the owner and operator of Love Field and has been at all times relevant to this controversy. Dallas exercises full control to the extent permissible over that airport with the noted exception that some degree of its governmental function appears to have been relinquished to the Dallas-Fort Worth Regional Airport Board pursuant to the waiver provisions contained in the 1968 Bond Ordinance. (R. 2195). Dallas, of course, has been the recipient of numerous types of federal grants for the benefit of Love Field. (R. 304, 4859, 4874, 4886). There are several outstanding bond issues containing covenants stating generally that Love Field will remain open for all airport uses. (R. 321, 322). Dallas has consistently maintained during the course of this controversy that it has no intention or desire to close Love Field as an airport. This position has been restated as recently as October 21, 1974, in a resolution adopted by the City Council of Dallas (Appendix A attached hereto).

Dallas and Fort Worth together have created the Dallas-Fort Worth Regional Airport Board pursuant to the authority contained therefor in Article 46d-1, et seq., Vernon's Tex.Civ.Stat. Collectively these two cities, along with the Dallas-Fort Worth Regional Airport Board, have been the recipients of federal moneys granted by the FAA for the construction of the Dallas-Fort Worth Regional Airport. (R. 567). The Cities have collectively adopted joint bond ordinances (R. 2040, 2268, 2643, 2889, 3142, 3429) and issued bonds thereon. These ordinances contain, among other items critical here, the definitions of "CERTIFICATED AIR CARRIER SERVICES" (R. 2151); Section 9.5 which pro-

vides for phase-out of Love Field to the extent "legally permissible" (R. 2195); and the waiver provisions permitting the Board, under certain conditions, to grant a waiver from the phase-out provisions heretofore referenced (R. 2195).

Lastly, of course, the two Cities, along with the Dallas-Fort Worth Regional Airport Board, filed the petition for declaratory judgment which is the beginning phase of this matter, seeking a declaration that Southwest may be excluded from Dallas-Love Field because the whole field of air carrier services was pre-empted by the CAB by its orders issued in the Dallas-Fort Worth Regional Airport Investigation, and further, that the Cities were not prohibited by any federal or state law from requiring that Southwest move from Dallas-Love Field to the new D-FW Regional Airport. (R. 222, 223).

(6) The Federal Aviation Administration (hereinafter "FAA") participated in the CAB proceedings heretofore mentioned, the Dallas-Fort Worth Regional Airport Investigation. The FAA has required that Greater Southwest International Airport (GSIA) be closed upon the opening of the new Dallas-Fort Worth Regional Airport for the reason that the geographical position of GSIA places it within the traffic patterns of the new airport, thus posing a safety hazard (see footnote 1, Petition, page 6), but it is noteworthy that the FAA has not required that Dallas-Love Field be closed for any reasons to any aircraft upon the opening of D-FW Regional Airport. Safety is not a consideration at Dallas-Love Field. (R. 589). The FAA, as previously noted, granted money to the Dallas-Fort Worth Region-

al Airport Board pursuant to the terms, conditions and authority contained in the Airport and Airway Development Act of 1970. 49 U.S.C. Sec. 1701, et seq. The FAA has not, to the extent determined by any party to this matter, issued a regulation or directive excluding any intrastate carrier, including Southwest, from conducting its operations in and out of Dallas-Love Field. Although a representative of the FAA testified in the District Court below, Respondent especially points out that the FAA has not intervened in this matter despite the prognostication by the Petitioners that certain grave consequences will befall the FAA and its programs if the opinion of the Fifth Circuit stands.

(7) The last and most sedentary participant in this proceeding is Dallas-Love Field itself. As previously noted, it is owned and operated by the City of Dallas except to the extent that the City appears to have relinquished some degree of its governmental function to the D-FW Regional Airport Board pursuant to the waiver provision contained in the 1968 Concurrent Bond Ordinance. (R. 2195). Dallas-Love Field has been the recipient of various federal grants. (R. 304, 4859, 4874, 4886). There are outstanding public bonds containing covenants essentially requiring that Dallas-Love Field remain open for all aviation use. (R. 321, 322). It has been a public airport in excess of thirty years with air carrier passenger services provided for most of that time.

THE WRIT SHOULD BE DENIED FOR THE FOLLOWING REASONS

1. The United States Court of Appeals for

the Fifth Circuit had a right to decide and did correctly decide the questions in this case pursuant to principles of established state law even though the Circuit Court properly had federal question jurisdiction and did not decide the case expressly on that basis. Siler v. Louisville and Nashville Railway Co., 213 U.S. 175 (1909). This matter in its proper focus presents the threshold question of the authority of a Home Rule City to exclude from its public airport a state-created and authorized intrastate air carrier passenger service. It is to the distribution of authority as between the municipality and the State that the opinion of the Court is addressed, recognizing the validity and applicability of City of Arlington v. Lillard, 116 Tex. 446, 294 S.W. 829 (1927), and City of Fort Worth v. Lillard, 116 Tex. 509, 294 S.W. 831 (1927) as determinative. The basic factual analogy between these cases and the instant case was held by the Court to be close and valid (Appendix A to Petition, p. 4a), dictating that a municipality cannot prohibit that which the State has authorized.

The provisions of Article XI, Section 5 of the Texas Constitution and Article 46d-7(b), Vernon's Tex.Civ.Stat. (Appendix D to Petition, p. 6d), clearly proscribe the passage of an ordinance by a municipality that is in conflict with state law and regulations promulgated pursuant thereto. The so-called phase-out provisions of the 1968 Bond Ordinance, Section, 9.5 as urged by the Petitioners, requires the removal from Dallas-Love Field and the exclusion therefrom of the state-certificated air carrier passenger services provided by Respondent Southwest. Those services cannot be unilaterally

removed by Southwest without the prior consent and approval of the Texas Aeronautics Commission (TAC Minute Order 22). That consent has been neither sought nor granted. The opinion of the Court correctly noted that, "The cities' road to relief passes by the Texas Aeronautics Commission." (Appendix A to Petition, page 7a).

In this context, the Petitioners would ascribe to Congress, pursuant to the Federal Aviation Act of 1958, 49 U.S.C. Sec. 1301, et seq., and the Airport and Airway Development Act of 1970, 49 U.S.C. Sec. 1701, et seq., the clear intent to preempt the relationship between a state and its municipalities. The CAB, pursuant to the Federal Aviation Act of 1958, certainly does not possess the authority to control airport designation insofar as it relates to the airport a purely intrastate certificated air carrier may serve. Braniff Airways, Inc. v. Civil Aeronautics Board, supra. The TAC performs that function, while the CAB performs that function with respect to CAB-certificated air carriers. City of Dallas v. CAB, 221 F.2d 501 (D.C.Cir. 1954), cert. denied 348 U.S. 914 (1955).

The Airport and Airway Development Act (hereinafter "Act") upon which Petitioners place great emphasis in postulating complete federal pre-emption of the subject matter of this case, as well as total frustration of important federal policies of overriding national significance, is not in point. Petitioners imply that the Act and a master planning document prepared by Petitioners to satisfy provisions of that Act confer upon the City of Dallas the power to exclude scheduled operations

of Southwest from Love Field. Nothing in the Act either expressly or impliedly grants the authority to Petitioner to exercise control over an intrastate-certificated air carrier to the extent that the Petitioner, pursuant thereto, may exclude that air carrier from a public airport. Such is not the plain intent, effect or purpose of the Act. Florida Avocado Growers v. Paul, 373 U.S. 132, 142 (1963).

The District Court observed the purpose of the Act is to provide for the planning and construction of airports; it does not empower a municipal airport authority or regional planning agency to determine the routes of certificated air carriers (R. 41, Memorandum Opinion, p. 14, Appendix p. 301); U.S. Code Congressional and Administrative News, 1970, p. 3047. Petitioners, however, ask this Court to read into 49 U.S.C. Sec. 1714(a) language authorizing municipalities to prohibit certain air carrier operations at their airports as they may see fit. The provisions on which they apparently rely empower the Secretary of Transportation to make grants for the development of airports, "the primary purpose of which is to serve general aviation and to relieve congestion at airports having a high density of traffic serving other segments of aviation", and for the development of airports "serving segments of aviation other than air carriers certificated by the Civil Aeronautics Board . . . ". 49 U.S.C. Sec. 1714(a)(1) and (2). This language does not bestow upon a municipality the authority to exclude a state-regulated carrier from any airport, even one "the primary purpose of which is to serve general aviation. . . ". It does empower the Secretary of Transportation to make

grants of federal moneys for the construction of new airports. Moreover, the authority of a municipality to construct new airports is not at issue; the only question here is whether it may exclude an airline from an existing facility which has been constructed and improved with assurances that it would remain open to scheduled air carrier operations. (R. 41, Memorandum Opinion, p.1, Appendix p. 288; and pp. 33-35, Appendix pp. 320-322).

The position of the Court is enforced by reference to the declaration of congressional policy contained in Sec. 1701 of the Act (Appendix H to Petition, p. 1h). It states:

> "That substantial expansion and improvement of the airport and airway system is required to meet the demands of interstate commerce, the postal service, and the national defense." (Emphasis added.)

The thrust of the Act is clearly addressed to considerations of ". . .interstate commerce. . ." and not intrastate regulation of intrastate air carriers subject only to the jurisdiction of the state where their services are performed. Furthermore, Sec. 1716(b) (Appendix H to Petition, page 6h) and (c)(1)(D) and (E) basically provide that (1) nothing in the Act will authorize a municipality to submit a project grant application where state law prohibits the municipality from making an application and (2) the municipality must have the legal authority to engage in the development as proposed. It would appear that the collective import of the referenced

provisions would negative any concept that Congress, by the Act, intended to pre-empt the ability of the state to designate routes of intrastate air carriers and regulations related thereto.

Respondent would also point out that to pursue Petitioners' theory of pre-emption would mean that the Petitioners also provided for themselves a contractual mechanism by which they could waive or override that federal pre-emption. Section 9.5 of the 1968 Bond Ordinance (R. 2195) provides that the D-FW Regional Airport Board may grant a waiver of the so-called phase-out of Love Field; thus, the applicability of federal pre-emption is at the discretion of the Petitioners. Respondent respectfully urges that pre-emption is not a valid issue.

Nor can Respondent perceive any viable reason sustaining the proposition that the opinion of the Court will result in frustration of a national policy of considerable importance. There are no inherent factors in the national airport system plan, whatever the scope of it may be, that indicate, dictate, suggest or require that an intrastate certificated air carrier (Southwest) be excluded from utilizing Dallas-Love Field so long as that field remains open. The only entity here seeking to exclude or attempting to require the exclusion of Southwest from Love Field is the City itself. It is not the FAA or the CAB. One cannot find within the framework of any of the federal acts involved here language of an exclusionary nature prohibiting or requiring the prohibition of Southwest from Dallas-Love Field.

The only evidence cited by Petitioners suggesting their theory that the opinion of the Fifth Circuit frustrates national policy is to be found in the Petition itself (pages 13, 14, and footnotes 9, 10). Suffice it to point out that the actions described therein of the CAB-certificated air carriers and of the Petitioners are not the result of or done in furtherance of any state action, policy, statute or regulation. They are the individual acts of those parties taken pursuant to their own decisions. Whatever rights, obligations and liability may result therefrom are wholly outside the issues in this matter.

The formulation of great questions of pre-emption and frustration of federal policies are but mere ghosts tendered by Petitioners to disguise the threshold question at issue in this case. The Court should not find federal pre-emption of state law unless that is the "clear and manifest purpose of Congress". Rice v. Santa Fe Elevator Corporation, 331 U.S. 218, 230 (1947). To repeat, there is no conflict between the federal programs involved here and the state laws determinative of the issue in this case. The question of pre-emption does not arise. Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 446 (1960).

2. The opinion of the Fifth Circuit is not in conflict with the opinion of the Court in City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624. At issue there was the promulgation of local noise ordinances in direct conflict with an FAA regulatory authority granted by the Noise Control Act of 1972, 42 U.S.C. Article 4901, et seq., 1973. For

the City of Burbank v. Lockheed Air Terminal to be controlling, this Court would have to find within the context of the Airport and Airway Development Act of 1970 and the Federal Aviation Act of 1958 and/or a regulation issued thereunder by the FAA pursuant thereto, a clear conflict between the federal law and some state act or regulation. Respondent strongly urges that no such conflict exists.

3. United States v. City of New Haven, 496 F.2d 452 (2d Cir. 1974), cert. denied 43 U.S. Law Week 3247 (1974), does not support the position of Petitioners that there is a conflict with the opinion of the Second Circuit. The case is distinguishable on the grounds that the State of Connecticut was seeking to enjoin the use of the national air space as it relates to an approach to a segment of an existing runway. To the contrary, we have here that the City of Dallas intends to keep Love Field open, a condition most acceptable to Respondent. The TAC urges only that one of its certificated air carriers is authorized to continue to serve that public airport so long as it does remain open. There is here no exercise of state power in conflict with or to the detriment of any federal program or policy.

4. City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320 (1958), is clearly distinguishable and inappropriate to support Petitioners. There a city acquired the power of federal condemnation pursuant to 16 U.S.C. Sec. 814 (1970) as a licensee and agency operator of a federal hydro-electric dam project on navigable waters. The State sought to enjoin the city's condemnation of state land, a power not residing in the city under state law. In a prior

related case challenging the issuance of the license to the City of Tacoma, because the license provisions conflicted with State law, the Ninth Circuit upheld the grant of the license. The Court saw total frustration of the authorized federal project if the position of the State were determinative. State of Washington Dept. of Game v. F.P.C., 207 F.2d 391 (9th Cir. 1953),cert. denied 347 U.S. 936 (1954). The Supreme Court in the case cited by Petitioners held that the State's action to obtain an injunction was an invalid collateral attack on the Ninth Circuit's decision. Respondent does not believe that the City of Dallas maintains that it is a federal licensee to operate Dallas-Love Field as a federal project. Additionally, investiture of the power of condemnation in a municipality on behalf of the Federal Government in furtherance of a federal project is not at issue in this matter.

5. Petitioners seek to raise a due process question with reference to the promulgation of TAC Minute Order No. 22. Their assertions are inappropriate and insupportable. Furthermore, Petitioners have not sought to have their complaint, if any, reviewed in the manner provided by the Legislature of Texas for judicial review of actions of the Respondent TAC. Article 46c-6, Subdivision 3(e), Vernon's Tex.Civ.Stat. Petitioners' action is an unauthorized collateral attack under the laws of the State of Texas. Alpha Petroleum Co. v. Terrell, 122 Tex. 257, 59 S.W.2d 364, 367 (1933).

In summary, the reasoning and authorities cited by Petitioners do not support the position taken.

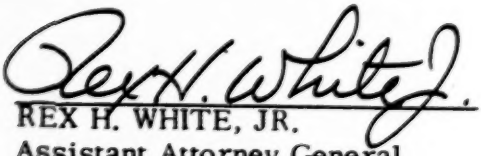
CONCLUSION

The opinion of the United States Court of Appeals for the Fifth Circuit resolves the conflict between the State of Texas and one of its municipalities upon principles of settled state law. The relationship between the State and its municipalities has not been pre-empted by the respective federal statutes urged by Petitioners herein, nor does the opinion result in the furtherance of a state action disruptive of national policies of great importance. For the reasons stated herein, Respondent respectfully urges that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

JOHN L. HILL
Attorney General of Texas

LARRY F. YORK
First Assistant Attorney General



REX H. WHITE, JR.
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711

Attorneys for Respondent
Texas Aeronautics Commission

CERTIFICATE OF SERVICE

I, Rex H. White, Jr., one of the attorneys for Respondent herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 22 day of November, 1974, I served three (3) copies of the foregoing document, in duly addressed envelopes, with airmail postage prepaid, as required by Rule 33 (1) of this Court, upon each of the following parties: N. Alex Bickley, City Attorney, City of Dallas, Texas, 501 City Hall, Dallas, Texas 75201; S. G. Johndroe, Jr., City Attorney, City of Fort Worth, Texas, 1000 Throckmorton Street, Fort Worth, Texas 76102; Lee E. Holt, Legal Counsel, Dallas-Fort Worth Regional Airport Board, P. O. Drawer DFW, Dallas-Fort Worth Airport, Texas 75261; Herbert D. Kelleher, Oppenheimer, Rosenberg, Kelleher & Wheatley, Inc., Suite 620, 711 Navarro, San Antonio, Texas 78205; Erwin N. Griswold, James M. Burger, Reavis, Pogue, Neal and Rose, 1100 Connecticut Avenue, N.W., Washington, D.C. 20036; Charles S. Rhyne, Courts Oulahan, Alfred J. Tighe, Jr., David M. Dixon, Rhyne & Rhyne, 400 Hill Building, 839 Seventeenth Street, N.W., Washington, D.C. 20006; George S. Lapham, Jr., Air Transport Association of America, 1709 New York Avenue, N.W., Washington, D.C. 20006; John L. Hauer, Akin, Gump, Strauss, Hauer & Feld, 2800 Republic National Bank Building, Dallas, Texas 75201.

Rex H. White, Jr.

REX H. WHITE, JR.
Assistant Attorney General

COUNCIL CHAMBER

October 21, 1974

74-4118

APPENDIX A

Councilman Weber presented the following resolution and moved its adoption:

WHEREAS, published reports concerning the present and intended future actions of parties involved in the Dallas Love Field airport controversy have necessitated renewed public discussion concerning the policy of the City of Dallas towards the total closing of Love Field as an airport facility; and

WHEREAS, the Dallas City Council believes it to be in the public interest that there be no doubt of its determination of policy in this regard; Now, Therefore,

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF DALLAS:

SECTION 1. That the City Attorney be, and is hereby instructed to take such legal steps as may be necessary and proper in order to prevent the total closing of Love Field as an airport facility.

SECTION 2. That this resolution shall take effect immediately from and after its passage in accordance with the provisions of the Charter of the City of Dallas, and it is accordingly so resolved.

APPROVED AS TO FORM:
N. ALEX BICKLEY, City Attorney

By _____
Assistant to City Attorney

Motion seconded by Councilwoman Patterson and unanimously carried.

WP
cc to Weber

Harold G. Shank
Harold G. Shank
City Secretary

APPROVED _____ APPROVED _____ APPROVED _____
HEAD OF DEPARTMENT CITY AUDITOR CITY MANAGER